SUMMARY WORKSHEET FOR CHANGES TO ARTICLE 5 (G/C) 9-13-12

Change "person" to "individual" in appropriate places throughout (when corporations are not included in the definition)

Throughout the reporter's comments there are references to the 2012 amendments. This will need to be changed to reflect the actual year of passage.

62-5-303(4)

Original bill

(4) The primary respondent is not required to be represented by counsel but is entitled to be represented by counsel of his or her choosing. If the primary respondent is not represented by counsel, then:

(A) upon the request of the primary respondent, the court may allow the primary respondent to proceed pro se or instruct the guardian ad litem to assist the primary respondent in obtaining counsel or

(B) upon the request of the primary respondent, guardian ad litem, any party, or upon the court's own motion,

the court may appoint counsel for the primary respondent. Nothing in this section shall be construed to require an attorney to accept an uncompensated appointment. During the pendency of any guardianship proceeding, any attorney purporting to represent the primary respondent shall file a notice of appearance with the court. Fees for counsel retained by a primary respondent who is determined to be incapacitated shall be subject to approval by the court.

Version after Senate Judiciary subcommittee hearings

(4) The primary respondent is ~~not required~~ **entitled** to be represented by **his** counsel **of choice. If a court has not received written notification within fifteen days of service of the pleadings upon the primary respondent that counsel has been retained. The court shall appoint counsel to represent the primary respondent in the proceeding.** ~~but is entitled to be represented by counsel of his choosing. If the primary respondent is not represented by counsel, then:~~

~~(a) upon the request of the primary respondent, the court may allow the primary respondent to proceed pro se or instruct the guardian ad litem to assist the primary respondent in obtaining counsel; or~~

~~(b) upon the request of the primary respondent, guardian ad litem, any party, or upon the court's own motion, the court may appoint counsel for the primary respondent. Nothing in this subsection shall be construed to require an attorney to accept an uncompensated appointment.~~

Comment [FCM1]: We believe that this period should be increased to 20 days to give the probate judges more time to identify and name appropriate counsel, but also see alternative proposal contained in our report.

Comment [FCM2]: Should read "retained, the"

~~During the pendency of any guardianship proceeding, any attorney purporting to represent the primary respondent shall file a notice of appearance with the court. Fees for counsel retained by a primary respondent who is determined to be incapacitated shall be subject to approval by the court.~~

Alternative 1

(4) The primary respondent is entitled to be represented by his counsel of choice. If the primary respondent is not represented by counsel, then:

(A) upon the request of the primary respondent, guardian ad litem, or any party, the court shall appoint counsel for the primary respondent, or

(B) if the proceeding presents issues which the court, in its discretion, determines require the appointment of counsel in order to protect the rights of the primary respondent, the court shall appoint counsel for the primary respondent.

Alternative 2

The primary respondent is entitled to be represented by counsel of his or her choice. If the Respondent does not have counsel or does not notify the court in writing within 20 days of being served the Petition that the Respondent intends to represent himself or herself, the court will appoint an attorney to represent the Respondent.

Alternative 3

The primary respondent is entitled to be represented by counsel of his or her choice. If a court has not received written notification within twenty days of service of the pleadings upon the primary respondent that counsel has been retained, the court shall appoint counsel to represent the primary respondent in the proceeding.

62-5-303(5)

Original bill

(5) Upon the filing of the summons and petition with the court and proof of service of the summons and petition upon the primary respondent, the court shall appoint an examiner, who shall be a physician, to examine the primary respondent and report to the court the physical and mental condition of the primary respondent. Upon the motion or written request of the guardian ad litem, the primary respondent, any party or on its own motion, the court may appoint one or more additional examiners, who may be a physician or any other person the court determines qualified to evaluate the primary respondent's alleged impairment. If the court appoints any additional examiners, the court shall set out in the order appointing the examiner(s) why an additional examiner is necessary and why the appointed examiner(s) is appropriate to serve in that capacity. Each

examiner shall complete a verified report evaluating the condition of the primary respondent and file their original report with the court or deliver the original report to the guardian ad litem, who, without undue delay must file the report with the court by the deadline set by the court, but not less than forty-eight hours prior to any hearing in which the report will be introduced as evidence. For good cause, the court may allow admission of an examiner's report filed less than forty-eight hours prior to the hearing. All parties to the proceeding are entitled to a copy of examiners' reports. The examiner(s)' report(s) shall evaluate the condition of the primary respondent and shall contain, to the best information and belief of the examiner: (i) a description of the nature, type, and extent of the primary respondent's incapacity, including the primary respondent's specific functional impairments, (ii) a diagnosis and assessment of the primary respondent's mental and physical condition, including a statement as to whether the primary respondent is on any medications that may affect his actions or demeanor, (iii) where appropriate and consistent with the scope of the examiner's license, an evaluation of the primary respondent's ability to learn self-care skills, adaptive behavior, and social skills and a prognosis for improvement, (iv) the date or dates of the examinations, evaluations, and assessments upon which the report is based, (v) the identity of those persons with whom the examiner met or consulted regarding the primary respondent's mental or physical condition; and (vi) the signature of the examiner and the nature of any professional license held by the examiner. Unless otherwise directed by the court, in preparing a report for the court, the examiner may rely upon an examination conducted by the examiner within the ninety-day period immediately preceding the filing of the petition. In the absence of bad faith or malicious intent, an examiner appointed by the court and performing an examination and submitting a report under this section shall be immune from civil liability for any breach of patient confidentiality made in furtherance of his duties under this section. A report prepared pursuant to this section shall be admissible as evidence of the facts stated therein and the results of the examination or evaluation referred to therein.

Version after Senate Judiciary subcommittee hearings

(5) Upon the filing of the summons and petition with the court and proof of service of the summons and petition upon the primary respondent, the court shall appoint ~~an~~ **two qualified** examiner**s**, ~~who~~ **at least one of whom** shall be a physician, to examine the primary respondent and report to the court the physical and mental condition of the primary respondent. **The examiners shall submit their reports in writing to the court, the petitioner, the guardian ad litem, the primary respondent, and other parties to the proceeding in order that the reports shall be received by a date set by the court but in no event less than ten days before a hearing. If the court appoints an additional examiner, the court shall set forth in its order appointing an additional examiner the basis for the additional examiner and the need for an additional examiner.** ~~Upon the motion or written request of the guardian ad litem, the primary respondent, any party or on its own motion, the court may appoint one or more additional examiners, who may be a physician or any other person the court determines qualified to evaluate the primary respondent's alleged impairment. If the court appoints any additional examiners, the court shall set out in the order appointing the examiner why an additional~~

Comment [FCM3]: It is the subcommittee's belief that placing the burden of providing copies of their reports to all the listed persons on the examiner will be unenforceable and likely further limit the available pool of examiners. We would propose "The examiners shall submit their reports in writing to the guardian ad litem, who without undue delay must file the report with the court and provide copies to the petitioner, the primary respondent, and other parties to the proceeding. The reports must be filed with the court and provided to the parties not less than ten days before a hearing."

~~examiner is necessary and why the appointed examiner is appropriate to serve in that capacity. Each examiner shall complete a verified report evaluating the condition of the primary respondent and file his original report with the court or deliver the original report to the guardian ad litem, who without undue delay must file the report with the court by the deadline set by the court, but not less than forty-eight hours prior to any hearing in which the report will be introduced as evidence. For good cause, the court may allow admission of an examiner's report filed less than forty-eight hours prior to the hearing.~~ All parties to the proceeding are entitled to copies of examiners' reports. An examiner's report shall evaluate the condition of the primary respondent and shall contain, to the best information and belief of the examiner:

(a) a description of the nature, type, and extent of the primary respondent's incapacity, including the primary respondent's specific functional impairments;

(b) a diagnosis and assessment of the primary respondent's mental and physical condition, including a statement as to whether the primary respondent is on any medications that may affect his actions or demeanor;

(c) where appropriate and consistent with the scope of the examiner's license, an evaluation of the primary respondent's ability to learn self-care skills, adaptive behavior, and social skills and a prognosis for improvement;

(d) the date or dates of the examinations, evaluations, and assessments upon which the report is based;

(e) the identity of those persons with whom the examiner met or consulted regarding the primary respondent's mental or physical condition; and

(f) the signature of the examiner and the nature of any professional license held by the examiner. Unless otherwise directed by the court, in preparing a report for the court, the examiner may rely upon an examination conducted by the examiner within the ninety-day period immediately preceding the ~~filing~~ **hearing** of the petition. In the absence of bad faith or malicious intent, an examiner appointed by the court and performing an examination and submitting a report under this section shall be immune from civil liability for any breach of patient confidentiality made in furtherance of his duties under this section. A report prepared pursuant to this section shall be admissible as evidence of the facts stated therein and the results of the examination or evaluation referred to therein.

Comment [FCM4]: See subcommittee report submitted herewith

Comment [FCM5]: While the subcommittee understands the concern that reports could become stale, this language sets up a situation that may result in the need for a succession of examinations. At the time the examination is performed, it is unlikely that a hearing date has been set. If the date set is more than 90 days later than the examination, a new examination would be required. If a hearing is postponed for some reason, this could become an ongoing issue. See report submitted herewith for additional comments.

(8) After a hearing, or with the consent of all parties, upon the finding that a basis for the appointment of a guardian has been established as set forth in this section, the court shall make an appointment. A primary respondent represented by counsel may consent through counsel.

Comment [FCM6]: If counsel is required in every case, the phrase "represented by counsel" is redundant

REPORTER'S COMMENTS

Section 62-5-303 was significantly revised by the 2012 amendment.

The revised section adds the requirement of a summons and clarifies that a petition must be verified.

The phrase 'any person interest in the welfare of the primary respondent' is intended to be broader than then term 'interested person' defined in 62-1-201. For example, it could include a friend, neighbor, or person residing with the primary respondent.

Comment [FCM7]: Should be corrected to read "interested"

This section sets out the basic procedure for a finding of incapacity or appointment of a guardian. The section was also amended to provide for both guardianship with limitation and guardianship without limitation.

Section (2) provides detailed requirements for the content of a petition for appointment of conservator or other protective order. While the subsection requires the petitioner to provide only information known to the petitioner, it imposes on the petitioner a duty to engage in a reasonable effort to ascertain the required information. Specifying the required contents of the petition is in accordance with the recommendations of both the Wingspread conference on guardianship reform and the Commission on National Probate Court Standards. See Guardianship: An Agenda For Reform 9 (A.B.A. 1989); National Probate Court Standards, Standard 3.3.1, 'Petition' (1993).

Comment [FCM8]: Should be corrected. Delete "conservator or other protective order" and replace with "guardian or finding of incapacity"

Subsection (2)(g) emphasizes the importance of limited guardianship, the encouragement of which is a major theme of the Act. The petitioner, when requesting an unlimited guardianship, must state in the petition why a limited guardianship would not work. If a limited guardianship is requested, the petition must set out the recommended powers to be granted to the guardian.

Comment [FCM9]: May want to use name of Act. " Uniform Guardianship and Protective Proceedings Act"

A substantive change was made in that the appointment of a visitor is always optional under 62-5-314, but the appointment is no longer required at commencement of the action.

Subsection (3) provides for the appointment of a guardian ad litem, upon the filing and service of the verified petition for a finding of incapacity or appointment of a guardian. While appointment of a guardian ad litem occurs without a preliminary assessment of capacity by the court, the subsection makes it clear the mere appointment of the guardian ad litem does not impact the rights of the person allegedly in need of a guardian and the appointment is not evidence of incapacity.

Comment [FCM10]: Delete "mere"

With this revision, the roles of counsel and guardian ad litem have been separated. A guardian ad litem is required to be appointed in every case. A guardian ad litem must meet the qualifications set forth in Section 62-5-820, but the guardian ad litem is no longer required to be an attorney. If the guardian ad litem is an attorney, that person may not also serve as counsel for the primary respondent.

Subsection (4) provides that the primary respondent is ~~not required~~ **entitled** to be represented by ~~counsel, but is entitled to be represented by counsel~~ **an attorney** of his **or her** own choosing. **If the court hearing the proceeding has not received within fifteen days from the service of the pleadings, written notification that the primary respondent has representation the court shall appoint an attorney to represent the primary respondent.** ~~This subsection sets forth the options of the court when dealing with a primary respondent who is not represented by counsel. This section does not mandate the appointment of counsel, nor is the primary respondent required to be represented by counsel. If the court determines an unrepresented primary respondent should not proceed without counsel, the subsection authorizes the court to appoint counsel for the primary respondent. The subsection also suggests to the court the option of directing the guardian ad litem to assist the person in obtaining counsel. This would be particularly appropriate where the court felt the need for counsel and the person had adequate resources with which to pay counsel. The enhanced duties of the guardian ad litem established by Title 62, Article 5, Part 8, in conjunction with the enhanced qualification for persons acting as guardian ad litem should provide adequate protection of the interests of the person who is the subject of a guardianship proceeding in most cases.~~

Comment [FCM11]: See prior comment about extending to 20 days

Subsection (5) provides for the appointment of ~~an~~ **two** examiner**s, one of whom must be a physician,** in connection with a proceeding for a finding of incapacity or appointment of a

Section 62-5-312. ~~(a) A guardian of an incapacitated person has the same powers, rights, and duties respecting his ward that a parent has respecting his unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court:~~

~~(1) to the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this State.~~

~~(2) If entitled to custody of his ward he shall make provision for the care, comfort, and maintenance of his ward and, whenever appropriate, arrange for his training and education. Without regard to custodial rights of the ward's person, he shall take reasonable care of his ward's clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of his ward is in need of protection.~~

~~(3) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service.~~

~~(4) If no conservator for the estate of the ward has been appointed or if the guardian is also conservator, he may:~~

~~(i) institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty;~~

~~(ii) receive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward; but, he may not use funds from his ward's estate for room and board or services which he, his spouse, parent, or child have furnished the ward unless a charge for the services and/or room and board is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible. He must exercise care to conserve any excess for the ward's needs.~~

~~(5) A guardian is required to report the condition of his ward and of the estate which has been subject to his possession or control, as required by the court or court rule, but at least on an annual basis.~~

~~(6) If a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this Code, and the guardian must account to the conservator for funds expended.~~

~~(b) Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward and is entitled to receive reasonable sums for his services and for room and board furnished to the ward as agreed upon between him and the conservator, provided~~

~~the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to third persons or institutions for the ward's care and maintenance.~~

(1) The procedure for appointment of a temporary guardian with notice is as follows:

(A) In the case of a person who has no guardian or temporary guardian:

(i) following the filing of a summons and verified petition for appointment of guardian and service upon the primary respondent, any party may move the court for an order appointing a temporary guardian for the primary respondent;

(ii) unless made during a hearing in open court, the motion shall be in writing, and shall state with particularity:

Comment [FCM12]: Delete "in open court"

(a) the name and address of the proposed temporary guardian and that person's relationship to the primary respondent;

(b) to the extent known or reasonably ascertainable, those persons whose priority for appointment under Section 62-5-305 are higher than the priority of the proposed temporary guardian; and

(c) why the appointment of a temporary guardian is necessary for the welfare of the primary respondent.

(B) In the case of a person for whom a guardian or temporary guardian has previously been appointed, and that appointment has not been terminated through an adjudication of capacity:

(i) any party may move the court for an order appointing a temporary guardian for the ward;

(ii) unless made during a hearing in open court, the motion shall be in writing and shall state with particularity:

Comment [FCM13]: Delete "in open court"

(a) the name and address of the proposed temporary guardian and that person's relationship to the ward;

(b) to the extent known or reasonably ascertainable, those persons whose priority for appointment under Section 62-5-305 are higher than the priority of the proposed temporary guardian;

(c) why the current guardian or temporary guardian cannot or is not adequately fulfilling the guardian's duties to the ward; and

(d) why the appointment of a temporary guardian is necessary for the welfare of the ward.

(1) The procedure for appointment of a temporary guardian with notice is as follows:

(A) In the case of a person who has no guardian or temporary guardian:

(i) following the filing of a summons and verified petition for appointment of guardian and service upon the primary respondent, any party may move the court for an order appointing a temporary guardian for the primary respondent;

(ii) unless made during a hearing in open court, the motion shall be in writing, and shall state with particularity:

Comment [FCM14]: Delete "in open court"

(a) the name and address of the proposed temporary guardian and that person's relationship to the primary respondent;

(b) to the extent known or reasonably ascertainable, those persons whose priority for appointment under Section 62-5-305 are higher than the priority of the proposed temporary guardian; and

(c) why the appointment of a temporary guardian is necessary for the welfare of the primary respondent.

(B) In the case of a person for whom a guardian or temporary guardian has previously been appointed, and that appointment has not been terminated through an adjudication of capacity:

(i) any party may move the court for an order appointing a temporary guardian for the ward;

(ii) unless made during a hearing in open court, the motion shall be in writing and shall state with particularity:

Comment [FCM15]: Delete "in open court"

(a) the name and address of the proposed temporary guardian and that person's relationship to the ward;

(b) to the extent known or reasonably ascertainable, those persons whose priority for appointment under Section 62-5-305 are higher than the priority of the proposed temporary guardian;

(c) why the current guardian or temporary guardian cannot or is not adequately fulfilling the guardian's duties to the ward; and

(d) why the appointment of a temporary guardian is necessary for the welfare of the ward.

(C) As soon as practicable after the filing of a motion for appointment of temporary guardian, the court shall set a hearing on the motion.

(D) Notice of the hearing on the motion as provided in Section 62-1-401 must be given to the ward or primary respondent, and those persons listed in Section 62-5-303(2)(d).

(E) At or following the hearing convened for the purpose of considering the appointment of a temporary guardian, the court may appoint a temporary guardian for a ward or primary respondent, if the court makes findings that:

(i) no guardian has been appointed for the primary respondent or the guardian or temporary guardian for a ward is not effectively performing his duties;

(ii) in the case of a person for whom there has been no adjudication of incapacity, a physician has certified to the court, orally or in writing, that the person is incapacitated; and

(iii) the welfare of the ward or primary respondent requires immediate action.

(F) An order appointing a temporary guardian shall:

(i) set forth the duration of the appointment; which, except for good cause shown, shall not exceed six months;

(ii) set forth a concise statement of the evidence submitted at the hearing;

(iii) set forth the findings required under item (1)(E);

(iv) state the reason temporary guardianship is necessary for the welfare of the primary respondent or ward; and

(v) set forth whether the appointment is of a temporary guardian with limitation or a temporary guardian without limitation; and, if a temporary guardian with limitation, the powers and duties of the guardian.

(G) To the extent practicable and consistent with the urgency of the needs of the primary respondent or ward, in appointing a temporary guardian the court shall consider persons, who are otherwise qualified, in the same order of priority it does in appointments of guardians under Section 62-5-305.

(2) The procedure for the emergency appointment of a temporary guardian is as follows:

(A) any person interested in the welfare of a ward or primary respondent, may file a motion for the emergency appointment of a temporary guardian;

(B) upon receipt of the motion, the court may issue an order ex parte or schedule a hearing with such notice as the court may prescribe, all as the interests of justice and the needs of the ward or primary respondent require;

(C) no order appointing a temporary guardian for a ward or primary respondent shall issue except as provided in Section 62-3-312(1), unless (i) the subject of the motion has previously been adjudicated incapacitated or (ii) a physician has certified to the court, orally or in writing, that in that physician's opinion the person is incapacitated, and it clearly appears from specific facts, shown by affidavit or by a verified petition for appointment of guardian, that an emergency exists;

(D) an emergency order appointing a temporary guardian shall be endorsed with the date of issuance, filed in the record of the case, and served, together with a summons and verified petition for appointment of guardian, in the event no summons and verified petition have previously been served in the action and no guardian has previously been appointed, upon the ward or primary respondent, and those persons required to receive notice of a summons and petition for guardianship under Section 62-5-303;

(E) an emergency order appointing a temporary guardian must state the nature of the emergency, and, if no notice was required, state the reason the order was granted without notice;

(F) An emergency order appointing a temporary guardian shall expire by its terms within such time after entry, not to exceed thirty days, as the court fixes, unless within the time so fixed in the order, for good cause shown, the order is extended for a like period. The reasons for the extension shall be set forth in the order granting the extension;

(G) on two days' notice to the party who obtained the emergency order appointing a temporary guardian, or upon shorter notice to that party as the court may prescribe, the primary respondent, ward, or any party opposed to the order may appear and move its dissolution or modification, and in that event, the court shall proceed to hear and determine the motion as expeditiously as the ends of justice require;

Comment [FCM16]: In reviewing the language of this paragraph, the subcommittee recommends that it be modified slightly to clarify

(D) an emergency order appointing a temporary guardian shall be endorsed with the date of issuance, filed in the record of the case, and serviced upon the ward or primary respondent, and those persons required to be receive notice of a summons and petition for guardianship under Section 62-5-303;

(E) [NEW E – CHANGE LETTERS AFTER E] if no summons and verified petition have previously been served in the action and no guardian has been previously appointed, the emergency order appointing a temporary guardian must be served with a summons and verified petition for appointment of guardian;

Section 62-5-313. ~~(a) The court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, has jurisdiction over resignation, removal, accounting, and other proceedings relating to the guardianship.~~

~~(b) If the court which appointed the guardian, or in which acceptance of appointment is filed, being the court in which proceedings subsequent to appointment are commenced, determines that the proceedings more appropriately belong in the court located where the ward resides, the first court shall notify the other court, in this or another state, and after consultation with the other court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever may be in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed.~~

(1) Except as otherwise limited by the court, a guardian shall:

(a) make decisions regarding the ward's health, education, maintenance and support;

(b) exercise authority only as necessitated by the ward's limitations and, to the extent possible, encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs;

(c) consider the expressed desires and personal values of the ward to the extent known to or reasonably ascertainable by the guardian;

(d) act in the ward's best interest and exercise reasonable care, diligence, and prudence;

(e) become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

(f) take reasonable care of the ward's personal effects and bring protective proceedings if necessary to protect the property of the ward;

(g) expend money of the ward that has been received by the guardian for the ward's current needs for health, education, maintenance and support;

(h) conserve any excess money of the ward for the ward's future needs; provided, however, if a conservator has been appointed for the estate of the ward, the guardian immediately shall pay the ward's money and deliver the ward's property to the conservator;

(i) immediately notify the court if the ward's condition has changed to the extent that the ward is capable of exercising rights previously removed; and

(j) inform the court of any change in the ward's custodial dwelling or address.

Comment [FCM17]:
Upon additional review, the subcommittee recommends substitution of the following to clarify and to eliminate some redundancy.

(1) Except as otherwise limited by the court, a guardian shall ***have the following duties:***
(a) ***to*** make decisions regarding the ward's health, education, maintenance and support;
(b) ***to*** exercise authority only as necessitated by the ward's limitations and, to the extent possible, to encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs;
(c) *to* consider the expressed desires and personal values of the ward to the extent known to or reasonably ascertainable by the guardian;
(d) ***to*** act in the ward's best interest and exercise reasonable care, diligence, and prudence;
(e) ***to*** become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;
(f) ***to*** take reasonable care of the ward's clothing, furniture, vehicles and other personal effects and ***commence*** protective proceedings if necessary to protect the property of the ward;
(g) ***to*** expend money of the ward that has been received by the guardian for the ward's current needs for health, education, maintenance and support;
(h) ***to*** conserve any excess money of the ward for the ward's future needs; provided, however, if a conservator has been appointed for the estate of the ward, ***to*** immediately pay the ward's money and deliver the ward's property to the conservator;
(i) ***to*** immediately notify the court if the ward's condition has changed to the extent that the ward is capable of exercising rights previously removed; and
(j) ***to*** inform the court of any change in the ward's custodial dwelling or address.
(2) Except as otherwise provided by law or by the court and in addition to the foregoing duties, a guardian shall have the following powers:
(a) A guardian of a ward has the same powers, rights, and duties respecting the ward that a parent has for an unemanicipated minor child, except that a guardian is not liable to third persons for acts of the ward nor is the guardian financially responsible for the ward solely by reason of his appointment as guardian. If a ward is in a facility licensed by the Department of Health and Environmental Control, the guardian is not responsible for placement in another facility or for providing care for the ward in the home of the guardian; however, the guardian is responsible for determining that the ward is receiving adequate and appropriate care and must cooperate in identifying alternative placement, if necessary, to the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to the detention or commitment of the ward.
(b) A guardian is entitled to custody of the person of his ward and may establish the ward's place of residence within this state. The guardian may establish the ward's place of residence outside this state upon express authorization of the court and in accordance with the provisions of Section 62-5-714.
(c) A guardian may give any consents, denials, or approvals that may be necessary to enable the war...

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(E)(1) The primary respondent is entitled to ~~retain~~ be represented by his counsel of ~~his or her choosing. If the primary respondent is not represented by counsel, then:~~ choice. If a court has not received written notification within fifteen days of service of the pleadings upon the primary respondent that counsel has been retained, the court shall appoint counsel to represent the primary respondent in the proceeding.

Comment [FCM18]: Suggest change to twenty days, but also see report. If changed here, change in comment as well.

Section 62-5-432. ~~If no local conservator has been appointed and no petition in a protective proceeding is pending in this State, then, except as provided in Section 62-5-431, a domiciliary foreign conservator may file with the court in this State in all counties in which property belonging to the protected person is located, authenticated copies of his appointment and of any official bond he has given. Thereafter, he may exercise as to assets in this State all powers of a local conservator and maintain actions and proceedings in this State subject to any conditions imposed upon nonresident parties generally.~~

(A) For purposes of this section, the following definitions shall apply:

(1) 'Court' means the probate court or the circuit court of the county in which the minor or incapacitated person resides or any court of this State in which a legal action regarding the claim in favor of or against the minor or incapacitated person has been properly commenced.

(2) 'Claim' means the net or actual amount payable to or on behalf of or paid by the minor or incapacitated person as a result of the settlement of a legal matter resulting in the payment of money or the delivery of real or personal property.

Comment [FCM19]: Suggest adding ", after the payment of all expenses of litigation and all outstanding reimbursements,"

(3) 'Conservator' means:

(a) for residents of this state a conservator appointed for the minor or incapacitated person by the probate court for the county in which the minor or incapacitated person resides; and

(b) for a nonresident of this State, a person appointed by a court in the state of residence of the minor or incapacitated person and who has authority and duties similar to those of a conservator in this state or a person appointed conservator for a nonresident by a probate court in this state in a county where the nonresident has property or the right to take legal action.

~~(B)(1) The settlement of any claim in favor of or against any minor or incapacitated person, for whom a conservator has previously been appointed and is serving, only may be effected by the conservator for such minor or incapacitated person.~~

~~(2) The settlement of any claim that does not exceed ten thousand dollars in favor of or against any minor or incapacitated person shall be effected by the conservator for the minor or incapacitated person or, if no conservator has previously been appointed, may be effected by: (i) the parent or guardian of the minor, (ii) a guardian appointed under Part 3 of this article for an incapacitated person, or (iii) a guardian ad litem appointed by the court for the minor or incapacitated person. The settlement of the claim may be effected without court approval and without the subsequent appointment of a conservator for the minor or incapacitated person. If the settlement requires the payment of money or the delivery of personal property for the benefit of the minor or incapacitated person, the payment or delivery must be made to a conservator previously appointed for the minor or incapacitated person or, if no conservator has been previously appointed, shall be made in accordance with Section 62-5-103, in which case the person receiving the money or personal property on behalf of the minor or incapacitated person~~

shall be authorized to execute a proper receipt and release or covenant not to sue therefor, which shall be binding upon the minor or incapacitated person.

(3) The settlement of any claim exceeding ten thousand dollars in favor of or against a minor or incapacitated person requires the appointment of a conservator for the minor or incapacitated person unless one has been previously appointed and is serving. If a conservator concludes that settlement of the claim exceeding ten thousand dollars in favor of or against his ward is in the best interest of the ward he may enter into the settlement as follows:

(a) subject to limitations placed upon a conservator by the appointing court, if the claim is twenty-five thousand dollars or less, the conservator may settle the claim without court authorization or confirmation, or the conservator may file with the court an application or motion for approval as provided item (4). If the settlement requires an application the payment of money or the delivery of personal property for the benefit of the minor or incapacitated person, the conservator shall receive the money or personal property and execute a proper receipt and release or covenant not to sue therefor, which shall be binding upon the minor or incapacitated person.

(4) Settlement of a claim with a value exceeding twenty-five thousand dollars requires court approval which the conservator may attain only as follows:

(a) The conservator must file with the court an application or motion setting forth all of the pertinent facts concerning the claim, payment, attorney's fees, and expenses, if any, and the reasons why, in the opinion of the conservator, the proposed settlement is fair and reasonable and should be approved by the court. The application or motion must include a statement by the conservator that, in his opinion, the proposed settlement is in the best interests of the minor or incapacitated person. Notice of hearing must be given to the minor or incapacitated person's guardian, the spouse, any adult children whose whereabouts are known or reasonably ascertainable, and if there is no spouse or adult children, the parents whose whereabouts are known or reasonably ascertainable. The court may approve or deny any application or motion for approval of a settlement filed by the conservator after notice and a hearing, or may in its discretion require the commencement of a formal proceeding under Section 62-5-428.

(b) If, upon consideration of the petition and after hearing the testimony as it may require concerning the matter, the court concludes that the proposed settlement is proper and in the best interests of the minor or incapacitated person, the court shall issue its order approving the settlement and authorizing the conservator to consummate it and execute a proper receipt and release or covenant not to sue therefor, which shall be binding upon the minor or incapacitated person.

(c) Except as provided in subitem (d), the order authorizing the settlement must require that payment or delivery of the money or personal property to or in favor of a minor or incapacitated person be paid to the conservator for the benefit of the minor or incapacitated person.

(d) If based upon the facts set forth in the application or motion or presented during the hearing, the probate court finds it is in the best interest of the minor or incapacitated person, the court may order any settlement proceeds placed in a special needs trust which complies with the

~~provisions of 42 U.S.C. 1396p(d)(4)(A) or in a pooled fund trust which complies with the provisions of 42 USC 1396p(d)(4)(C).~~

~~(c) If a party subject to the court order fails or refuses to pay the money or deliver the personal property as required by the order, the party may be found to be liable and punishable for contempt of court, but failure or refusal does not affect the validity or conclusiveness of the settlement.~~

~~REPORTER'S COMMENTS~~

~~As revised by the 2012 amendment, this section was formerly Section 62-5-433 which has been substantially modified. It addresses The settlement of claims in favor of or against a minor or incapacitated person.~~

~~Item (A) contains definitions applicable to this section.~~

~~Item (B)(1) states that if a conservatorship is in place, only the conservator may settle the claim.~~

~~Item (B)(2) addresses claims not in excess of $10,000.00. Such claims may be settled by a conservator. If no conservator has been appointed, the claim may be settled by the parent, guardian or guardian ad litem of a minor or by a guardian for an incapacitated person without court approval and without appointment of a conservator. If there is a conservator, any funds or property would be delivered to the conservator. If there is no conservator, funds or property could be delivered in accordance with 62-5-103.~~

~~Item (B)(3) addresses claims over $10,000.00 and requires the appointment of a conservator to effect the settlement.~~

~~Item (B)(4) states that for claims of $25,000.00 or less, the conservator, unless his authority has been limited by the court, may settle the claim without court approval or may file an application or motion for approval. For claims in excess of $25,000.00, the conservator must file an application or motion for approval.~~

Amend the bill further, as and if amended, by striking page 331, lines 15-43, page 332, lines 1-43, and page 333, lines 1-42, in their entirety and inserting the following:

/ (B)(1) The settlement of a claim in favor of or against any minor or incapacitated person, for whom a conservator has previously been appointed and is serving, only may be effected by the conservator for such minor or incapacitated person.

(2) If no conservator has previously been appointed, only claims that do not exceed five thousand dollars in favor of or against any minor or incapacitated person may be effected by: (i) the parent or guardian of the minor; (ii) a guardian appointed under Part 3 of this article for an incapacitated person; or (iii) a guardian ad litem appointed by the court for the minor or incapacitated person. The settlement of the claim may be effected without court approval and without the subsequent appointment of a conservator for the minor or incapacitated person. If the settlement requires the payment of money or the delivery of personal property for the benefit of the minor or incapacitated person, the payment or delivery must be made to a conservator previously appointed for the minor or incapacitated person or, if no conservator has been previously appointed, shall be made in accordance with Section 62-5-103, in which case the person receiving the money or personal property on behalf of the minor or incapacitated person shall be authorized to execute a proper receipt and release or covenant not to sue, which shall be binding upon the minor or incapacitated person.

(3) If a conservator has been appointed for a minor or an incapacitated person, then the settlement of a claim that is less than ten thousand dollars in favor of or against any minor or incapacitated person shall be effected only by the conservator for the minor or incapacitated person. The settlement may be effected without court approval. The settlement of a claim that is more than ten thousand dollars but less than twenty-five thousand dollars in favor of or against a minor or incapacitated person requires the appointment of a conservator for the minor or incapacitated person unless one has been previously appointed and is serving. Settlement of a claim with a value of more than ten thousand dollars requires court approval that the conservator may attain only as follows:

(a) The conservator must file with the court an application or motion setting forth all of the pertinent facts concerning the claim, payment, attorney's fees, and expenses, if any, and the reasons

Comment [FCM20]: Suggest changing to ten. Current and proposed facility of payment statute 62-5-103 allows a sum less than $10,000 to be paid as set forth without the necessity of a conservatorship. The cost of pursuing a conservatorship would be prohibitive for claim amounts between $5,000 and $10,000

why, in the opinion of the conservator, the proposed settlement is fair and reasonable and should be approved by the court. The application or motion must include a statement by the conservator that, in his opinion, the proposed settlement is in the best interests of the minor or incapacitated person. Notice of hearing must be given to the minor or incapacitated person's guardian, the spouse, any adult children whose whereabouts are known or reasonably ascertainable, and if there is no spouse or adult children, the parents whose whereabouts are known or reasonably ascertainable. The court may approve or deny any application or motion for approval of a settlement filed by the conservator after notice and a hearing, or may in its discretion require the commencement of a formal proceeding under Section 62-5-428.

(b) If, upon consideration of the application or motion and after hearing the testimony as it may require concerning the matter, the court concludes that the proposed settlement is proper and in the best interests of the minor or incapacitated person, the court shall issue its order approving the settlement and authorizing the conservator to consummate it and execute a proper receipt and release or covenant not to sue, which shall be binding upon the minor or incapacitated person.

(c) Except as provided in subitem (d), the order authorizing the settlement must require that payment or delivery of the money or personal property to or in favor of a minor or incapacitated person be paid to the conservator for the benefit of the minor or incapacitated person.

(d) If based upon the facts set forth in the application or motion or presented during the hearing, the probate court finds it is in the best interest of the minor or incapacitated person, the court may order any settlement proceeds placed in a special needs trust which complies with the provisions of 42 U.S.C. 1396p(d)(4)(A) or in a pooled fund trust which complies with the provisions of 42 USC 1396p(d)(4)(C).

Comment [FCM21]: Delete the word "fund"

(4) Settlement of a claim with a value exceeding twenty-five thousand dollars requires circuit court approval, which the conservator may attain only as follows:

(a) The conservator must file with the circuit court a motion setting forth all of the pertinent facts concerning the claim, payment, attorney's fees, and expenses, if any, and the reasons why, in the opinion of the conservator, the proposed settlement is fair and reasonable and should be approved by the circuit court. The motion must include a statement by the conservator that, in his opinion, the proposed settlement is in the best interests of the minor or incapacitated person. Notice of hearing must be given to the minor or incapacitated person's guardian, the spouse, any adult children whose whereabouts are known or reasonably ascertainable, and if there is no spouse or adult children, the parents whose whereabouts are known or reasonably ascertainable. The circuit court may approve or deny any motion for approval of a settlement filed by the conservator after notice and a hearing.

(b) If, upon consideration of the petition and after hearing the testimony as it may require concerning the matter, the circuit court concludes that the proposed settlement is proper and in the best interests of the minor or incapacitated person, the circuit court shall issue its order approving the settlement and authorizing the conservator to consummate it and execute a proper receipt and release or covenant not to sue, which shall be binding upon the minor or incapacitated person.

(c) Except as provided in subitem (d), the order authorizing the settlement must require that payment or delivery of the money or personal property to or in favor of a minor or incapacitated person be paid to the conservator for the benefit of the minor or incapacitated person.

(d) If based upon the facts set forth in the application or motion or presented during the hearing, the circuit court finds it is in the best interest of the minor or incapacitated person, the circuit court may order any settlement proceeds placed in a special needs trust which complies with the

Comment [FCM22]: Proposed change

If no action is pending in the circuit court, the conservator must file with the circuit court a summons and petition and serve said summons and petition on **the minor or incapacitated person's guardian, the spouse, any adult children whose whereabouts are known or reasonably ascertainable, and if there is no spouse or adult children, the parents whose whereabouts are known or reasonably ascertainable.** If an action is pending in the circuit court, the conservator must file with the circuit court a motion. The petition or motion, as applicable, shall set forth **all of the pertinent facts concerning the claim, payment, attorney's fees, and expenses, if any, and the reasons why, in the opinion of the conservator, the proposed settlement is fair and reasonable and should be approved by the circuit court. The petition or motion must include a statement by the conservator that, in his opinion, the proposed settlement is in the best interests of the minor or incapacitated person. Notice of hearing must be given to the minor or incapacitated person's guardian, the spouse, any adult children whose whereabouts are known or reasonably ascertainable, and if there is no spouse or adult children, the parents whose whereabouts are known or reasonably ascertainable. The circuit court may approve or deny any petition or motion for approval of a settlement filed by the conservator after notice and a hearing.**

provisions of 42 U.S.C. 1396p(d)(4)(A) or in a pooled fund trust which complies with the provisions of 42 USC 1396p(d)(4)(C).

(5) If a party subject to a court order fails or refuses to pay the money or deliver the personal property as required by the order, the party may be found to be liable and punishable for contempt of court, but failure or refusal does not affect the validity or conclusiveness of the settlement.

Comment [FCM23]: Delete the word "fund"

REPORTER'S COMMENTS

As revised by the 2012 amendment, this section was formerly Section 62-5-433 which has been substantially modified. It addresses the settlement of claims in favor of or against a minor or incapacitated person.

Item (A) contains definitions applicable to this section.

Item (B)(1) states that if a conservatorship is in place, only the conservator may settle the claim.

Item (B)(2) provides that claims not in excess of $5,000.00 may be settled by a parent, guardian, or guardian ad litem without court approval, if no conservator has been appointed. If there is a conservator, any funds or property would be delivered to the conservator. If there is no conservator, funds or property could be delivered in accordance with Section 62-5-103.

Comment [FCM24]: $10,000?

Item (B)(3) provides that claims not in excess of $10,000 may be settled by a conservator without court approval. Claims over $10,000.00 but less than $25,000 require the appointment of a conservator and either probate or circuit court approval to effect the settlement.

Item (B)(4) addresses claims over $25,000.00 and requires the conservator to obtain circuit court approval to effect the settlement.

Item (B)(5) addresses the jurisdiction of a probate or circuit court to hold in contempt a party who refuses to pay or deliver the personal property and continues the provision in previous law that the failure or refusal of a party does not affect the validity or conclusiveness of the settlement.

62-5-714

(1) Upon issuance of a provisional order in another state to transfer a guardianship or conservatorship to this State under procedures similar to those in Section 62-5-714, the guardian or conservator shall petition the court in this State to accept the guardianship or conservatorship. The petition must include a certified copy of the other state's provisional order.

Comment [FCM25]: Should this be "authenticated"

Section 62-5-716. ~~(A)~~ If a guardian has not been appointed in ~~another~~ this State and a petition for the appointment of a guardian is not pending in this State, ~~the~~ a guardian appointed in ~~the other~~ another state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this State by filing ~~as a foreign judgment in a court,~~ in any appropriate county of this State~~,~~ a certified ~~copies~~ copy of the ~~order and~~ letters of office in the register of deeds and also filing a clocked copy of the letters of office and a certified copy of the order of appointment in the probate court.

Comment [FCM26]: Replace "a certified" with "an authenticated"

Comment [FCM27]: Replace "a certified" with "an authenticated"

Section 62-5-717. If a conservator has not been appointed in this State and a petition for a protective order is not pending in this State, a conservator appointed in another state, after giving notice to the appointing court of an intent to register, may register the protective order in this State by filing in any appropriate county of this State a certified copy of the letters of office in the register of deeds and also filing a clocked copy of the letters of office, a certified copy of the order, and any bond in the probate court.

Comment [FCM28]: Replace "a certified" with "an authenticated"

Comment [FCM29]: Replace "a certified" with "an authenticated"

PART 8
Guardian Ad Litem under this Article

Section 62-5-810. The court has discretion in determining who will be appointed as a guardian ad litem in each case, subject to the requirements set forth in Section 62-5-820, and shall issue an order of appointment after obtaining the consent of the proposed guardian ad litem.

REPORTER'S COMMENTS

Prior to the 2012 amendments the previous version of the Article 5, Part 8 required that an attorney be appointed for the alleged incapacitated person and that the attorney have the powers and duties of a guardian ad litem. There was no guidance provided as to what those powers and duties should include and the dual role of attorney and guardian ad litem resulted in potential conflicts of interest. This Part 8 is based on the guardian ad litem statutes found in South Carolina Code of Laws, Title 63, Chapter 3, Article 7, concerning the family court guardian ad litem. This section sets out the basic authority and procedure for the appointment of a guardian ad litem in the probate court.

Comment [FCM30]: Add "," after "amendments"

Comment [FCM31]: Add "The two roles have now been separated."

Section 62-5-820. (1) To be appointed as a guardian ad litem pursuant to Section 62-5-810, a person must have the requisite knowledge or expertise to perform the required duties and must have completed the required training approved for guardians ad litem by the probate court making the appointment. These training requirements are:

(A) if the guardian ad litem is a non-lawyer:

(i) for initial qualification, a minimum of six hours; and

(iii) every three years after the year of initial qualification, a minimum of six additional hours;

(B) if the guardian ad litem is a lawyer:

(i) for initial qualification, a minimum of three hours; and

(ii) every three years after the year of initial qualification, a minimum of three additional hours.

(C) The training requirements of this section may be waived by the court for good cause shown.

(2) The training for a guardian ad litem serving in the probate court shall include a review of:

(A) Parts 1 through 4 of this article;

(B) the qualifications, responsibilities and duties of a guardian ad litem as set forth in this part; and

(C) issues commonly encountered by guardians ad litem, including, but not limited to: and

(i) resources, such as Social Security, Medicare, Medicaid, VA Benefits; and

(ii) probate court procedures.

(3) Upon accepting the appointment as guardian ad litem, a guardian ad litem must certify to the court that he meets the statutory qualifications.

(4) A person whose eligibility has lapsed may again become eligible for appointment as a guardian ad litem by completing the additional training required after initial qualification.

(5) For appointments made in the first year following enactment of this section, the court may waive the initial training requirement.

REPORTER'S COMMENTS

This revision allows both lawyers and non-lawyers to be appointed as guardian ad litem, specifies the requirements for eligibility and appointment of the guardian ad litem, and is based upon the family court requirements found in 63-3-820(A).

Subsection (5) allows the court to waive the training requirement for appointments made in the year after enactment in order to allow time for the creation and dissemination of training programs.

Section 62-5-830. (1) The responsibilities and duties of a guardian ad litem include, but are not limited to:

(A) acting in the best interest of the primary respondent;

(B) conducting an independent, balanced, and impartial investigation to determine the facts relevant to the situation of the primary respondent. An investigation must include, but is not limited to:

(i) obtaining and reviewing relevant documents. The guardian ad litem shall have access to the primary respondent's medical records (including, but not limited to, hospital records, physician's records mental health treatment records, chemical dependency treatment records, and VA treatment records, state and federal tax records, financial records), public benefits records, and any other relevant records. The guardian ad litem shall have, on behalf of the primary respondent, the right to institute or participate in discovery and in any proceedings to the same extent as any party to the action;

(ii) meeting with, observing, and interviewing the primary respondent on at least one occasion;

(iii) conveying to the primary respondent the substance of the petition, the nature, purpose and effect of the proceeding, and the primary respondent's rights at the hearing;

Comment [FCM32]: Delete "and"

Comment [FCM33]: Add comma after "records"

Comment [FCM34]: records),

Comment [FCM35]: delete)

Comment [FCM36]: add "unless excused by the court because the primary respondent is located outside of the state of South Carolina."

(iv) informing the primary respondent of the right to retain counsel or request the court to appoint counsel in accordance with the provisions of Section 62-5-303(4) or Section 62-5-403(E), as applicable;

(v) interviewing the petitioner, the proposed guardian, the proposed conservator, and any party who files an answer in the matter;

(vi) visiting the residence of the primary respondent, if deemed appropriate;

(vii) interviewing caregivers, relatives, and others with knowledge relevant to the case;

(viii) reviewing the criminal history of any individual proposed as guardian or conservator when deemed appropriate; and

(ix) considering the wishes of the primary respondent;

(C) advocating for the best interest of the primary respondent by making specific and clear suggestions, including information and recommendations regarding resources as may be appropriate or available to benefit the primary respondent;

(D) attending all probate court hearings, except when attendance is excused by the court or the absence is stipulated by all parties present at the hearing. The guardian ad litem must provide accurate, current information directly to the court;

(E) making recommendations regarding the appropriateness of the appointment of a guardian or conservator and any limitations to be imposed;

(F) presenting an oral report at the hearing on the information gathered, findings, and recommendations of the guardian ad litem, unless a written report has been submitted pursuant to paragraph (G) and attendance has been excused pursuant to paragraph (D); and

(G) upon request by the court, presenting to the court and all parties clear and comprehensive written reports including, but not limited to, a final written report regarding the best interest of the primary respondent. The written report, when requested, must be submitted to the court and all parties by the deadline set by the court, but at least forty-eight hours prior to the hearing, unless otherwise waived by the court. The guardian ad litem is subject to cross-examination on the facts and conclusions contained in the report.

(2) A guardian ad litem may submit reports, recommendations, briefs, memoranda, affidavits, or other documents on behalf of the primary respondent, in a manner consistent with the South Carolina Rules of Evidence and other state law. A guardian ad litem's notes are his work product and are not subject to subpoena.

(3) The guardian ad litem shall submit to the court a report that includes:

(A) the date and place of the meeting of the guardian ad litem with the primary respondent;

(B) whether the primary respondent approves of:

(i) the appointment of a guardian or conservator, as requested in the petition;

(ii) the person to be appointed; and

(iii) the extent of the requested authority;

(C) a description of the appearance of the primary respondent;

(D) a description of the condition of the place of the meeting, if appropriate;

(E) the diagnosis of the primary respondent;

Comment [FCM37]: Add "and any available prognosis for the primary respondent"

(F) any prior action with the Department of Social Services or law enforcement concerning the primary respondent or the proposed guardian or conservator, of which the guardian ad litem is aware;

(G) a statement as to any prior relationship between the guardian ad litem and the petitioner, primary respondent, or any other party to the action; and

(I) the signature of the guardian ad litem and the date of the report.

(4) The court may extend or limit the responsibilities and authority of the guardian ad litem upon good cause shown.

REPORTER'S COMMENTS

The listed responsibilities are adapted from the requirements for a guardian ad litem serving in the family court found in South Carolina Code of Laws Section 63-3-830. Subsection 1 codifies the responsibilities of the guardian ad litem. Subsection 2 specifically allows the guardian ad litem to introduce documents and protects the guardian ad litem's work. The new reporting requirement in Subsection 3 incorporates information gathered by the guardian ad litem into a minimum of one report, and includes information previously reported by an appointed visitor (the visitor appointment is now optional for the court under the 2012 amendments).

Section 62-5-840. (1) At the time of appointment of a guardian ad litem, the court must set forth the rate of compensation for the guardian ad litem based on the factors set forth in subsection (2). The court may set an overall maximum fee or an hourly rate of compensation. If the guardian ad litem determines that it is necessary to exceed the fee initially authorized by the judge, the guardian ad litem may move the court for additional compensation.

(2) A guardian ad litem appointed by the court is entitled to reasonable compensation and reimbursement for expenses, subject to the review and approval of the court. In determining the reasonableness of the fees and costs, the court must take into account:

(a) the novelty and difficulty of the issues before the court and the skill requisite to perform the responsibilities properly;

(b) the contentiousness of the proceedings;

(c) the time expected to be expended by the guardian ad litem;

(d) the likelihood that the acceptance of the appointment will preclude other employment of the guardian ad litem;

(e) the time limitations imposed by the circumstances;

(f) the experience, reputation and ability of the person being appointed by the court;

(g) the financial ability of each party to pay fees and costs; and

(h) any other factors the court considers necessary.

(3) If so directed by the court, the guardian ad litem must submit an itemized billing statement of hours, expenses, costs, and fees to the court.

(4) At any time during the action, a party may petition the court to review the reasonableness of the fees and costs submitted by the guardian ad litem.

REPORTER'S COMMENTS

This section is based upon Section 63-3-850, which addresses compensation for the guardian ad litem in family court.

Section 62-5-850. Any guardian ad litem appointed by the court must, upon request of the court or any party, provide written disclosure to each party:

(1) of the nature, duration, and extent of any relationship the guardian ad litem (or any member of the guardian ad litem's immediate family) has with any party; and

(2) of any interest adverse to any party or any party's attorney which might cause the impartiality of the guardian ad litem to be challenged.

REPORTER'S COMMENTS

This section is based upon Section 63-3-860, which addresses disclosure for the guardian ad litem in family court.

Section 62-5-860. (1) A guardian ad litem may resign or be removed from a case at the discretion of the court.

(2) Upon the appointment of a guardian or issuance of a protective order, the appointment of the guardian ad litem automatically terminates unless otherwise specified in the court order.

REPORTER'S COMMENTS

Subsection 1 is based upon Section 63-3-870, which addresses removal of the guardian ad litem in family court. Subsection 2 terminates the responsibilities of a guardian ad litem unless the court requires further action by the guardian ad litem on behalf of the primary respondent.

Section 62-5-870. A guardian ad litem appointed under this part and acting in the course and scope of the appointment is not liable for damages arising from an act or omission of the guardian ad litem committed in good faith. The immunity granted by this section does not apply if the conduct constitutes willful or wanton misconduct or gross negligence.

REPORTER'S COMMENTS

This addition provides statutory protection for lawyer and non-lawyer guardians ad litem. See Fleming v. Asbill, 326 S.C. 49, 483 S.E.2d 751 (S.C. 1997), and Vaughan v. McLeod Regional Medical Center, 372 S.C. 505, 642 S.E.2d 744 (S.C. 2007).